



4 April 2008

The Secretary
Department of Education, Employment and Workplace Relations
GPO Box 9879
CANBERRA ACT 2601

Dear Secretary,

Please find attached the submission of the Master Plumbers' and Mechanical Services Association of Australia on the Department of Education, Employment and Workplace Relations Inquiry into the National Employment Standards Exposure draft.

Yours faithfully,

Chris J Harnath
National Workplace Relations Advisor



NATIONAL EMPLOYMENT STANDARDS

TERMINATION OF EMPLOYMENT AND REDUNDANCY

CONSEQUENCES FOR PLUMBING INDUSTRY

PROFILE – MASTER PLUMBERS' & MECHANICAL SERVICES ASSOCIATION OF AUSTRALIA

The Master Plumbers' & Mechanical Services Association of Australia (MPMSAA) is the nationally registered employer organisation under the Workplace Relations Act representing employers in the plumbing and mechanical services industry. As such MPMSAA provides extensive services for a broad base of members in the plumbing and mechanical services industry. The principle activities of the MPMSAA include the provision of business and workplace relations services, industry representation, training and group training services and environmental programs focusing on sustainability of energy resources and water management particularly through its Green Plumber® initiative.

The MPMSAA is a not for profit organisation. It was established in 1891 and since that time the Association has continued to develop its reputation as the recognised and prominent national representative of plumbing industry employers.

As such the MPMSAA acts as the collective voice of members in the Plumbing Industry throughout Australia.

INTRODUCTION

1. The Federal Government has released its proposed National Employment Standards (NES). It is proposed that the standards will become the absolute minimum in modernised awards and such awards will not be able to reduce them. The Government has called for submissions from interested organisations as to whether the standards are appropriate and if not what variations should be made.

2. MPMSAA provides the following submission in regard to Termination of Employment under the NES and in particular on the maintaining of the exemption for “daily hire” employees in the building and plumbing industries. For the Plumbing Industry “daily hire” is a fundamental pillar of labour engagement.

A. TERMINATION OF EMPLOYMENT

HISTORY

3. The proposed NES for termination and redundancy reflects the standard that has been legislated in the Commonwealth Act since it was included in the *Industrial Relations Act 1988* in March 1994 and has been the accepted standard in the majority of awards since the *Termination, Change and Redundancy Test Case* of 1982.
4. However in 1982 the standard was not absolute, as now proposed, and it was possible for parties to awards to agree on variation to the standard. The building and construction industry (including the plumbing industry) did agree on a different standard to that established by the test case. The building and construction industry (including the plumbing industry) had been operating on a “daily hire” standard since the early 1970’s prior to which an hourly hire regime applied. In 1982 the building and construction industry maintained the daily hire standard and therefore the notice period was maintained at 1 days notice or 1 days pay in lieu of notice.
5. The reason for this is almost buried in the mists of time. During the hourly hire era building based awards did not provide for a number of employment conditions such as paid sick leave or public holidays. The practice of contractors employing day labour for most building related activities resulted in employees usually being hired at the commencement of a job and being terminated at the completion of a job. The specialised and regulated plumbing and electrical trades were commonly, but not universally, employed by subcontractors on a longer term basis, but carpenters, finishing trades and labourers were usually employed directly by the builders. This practice lead to the use of a formula for adjusting the

standard award weekly rates with a "*follow the job*" allowance, which assumed that there would inevitably be a number of days in any one year that a building worker was out of work. The formula was adjusted to take into account the non-payment of conditions that were progressively applied to workers in other industries. This resulted in the wage rate for an hourly hired building worker becoming known as the "*loaded hourly rate*". The affect of the loaded hourly rate was that the actual rate paid to a tradesperson working on hourly hire on a building site was significantly more than the weekly rate paid to a tradesperson in a manufacturing job, even though their "*work value*" was regarded as the same and hence their weekly base award wage rate was identical. The "*follow the job*" formula was adopted by the plumbing industry but called a "*lost time*" loading.

6. The move to daily hire and the progressive awarding to workers in the building industry of conditions enjoyed by employees in other industries did not significantly alter the concept of the "*lost time*" loading and the payment of higher wages to daily hire employees. Since the late 1970's there has been a progressive move to the employment of nearly all building related workers by specialised subcontractors and labour hire businesses. Such employers have been able to provide more stable work for their key employees and therefore there has been a reduction in the incidence of hiring for a single project and terminating at the completion of the project. However stable employment is by no means universal and the principle of daily hire employees receiving higher minimum wages than their weekly hire counterparts has continued.
7. For building related workers daily hire provides the advantage for them to move quickly to take advantage of obtaining employment on jobs that command higher rates of pay, (be it by way of site, district or work related allowances), or move from jobs which turn out not to be what they were seeking at the time of engagement. Similarly, employers have had the advantage of being able to terminate employees without making substantial payments in lieu of notice. Building based employees work in an environment which, by comparison to manufacturing, is less closely supervised and employers generally make monetary payments in lieu of notice.
8. For the reasons set out above the building industry, including the plumbing industry has maintained the concept of daily hire as it provides benefits to both employers and employees.

PREVIOUS STATUTORY REGIMES

9. The *Industrial Relations Act 1988* and the *Workplace Relations Act 1996* have at all times provided for an exclusion or exemption for daily hire employees in the building and construction industry (including plumbing) from the minimum notice periods generally regulated for employees.
10. From 1994 until 1996 this was by the Act providing that regulations may exempt certain classes of employees and such regulations providing for the exemption details.
11. Since 27th March 2006 the Act itself provided for the exemption (section 638(11) (b) (i)). It is relevant to note that section 638(11) (c) of the present Act provides an exemption for weekly hired employees in the meat industry whose termination is determined by seasonal factors.

THE NATIONAL EMPLOYMENT STANDARD

12. The proposed NES limits exemptions to:
 - employees employed under a contract of employment for a specified period of time or a specified task
 - employees serving a probation or qualifying or a qualifying period
 - employees whose employment is terminated because of serious misconduct
 - casual employees (including long term casuals)
 - trainee employees
 - seasonal employees.
13. Whilst the exclusion of seasonal employees (who were previously excluded – see paragraph 11 above) has continued, there appears to have been an oversight in confirming the exemption for daily hire workers in the Building and Plumbing Industry. This may be viewed outside the industry as a “minor” issue when looking at the complexity of producing the NES discussion paper, but is in fact significant for the building and plumbing industries.

THE REQUIREMENTS OF THE PLUMBING INDUSTRY

14. For the reasons set out above it is important that the plumbing industry and the building and construction industry maintain the standard of daily hire. The standard is of mutual benefit to employees and employers. Any variation which would result in the need to pay significant wages in lieu of notice would result in increased costs to employers and consequently increased costs to consumers adding to the cost of building and plumbing services in the commercial, industrial and domestic sectors.
15. MPMSAA submits that if the option of removing all reference to the NES from the legislation is to be adopted then the standard needs to include daily hire employees in the building and plumbing industries as a further exemption from the Termination Standard. MPMSAA further submits that if minimum standards for notice of termination of employment are to be retained in the new legislation the existing exemption needs to be maintained, either in the Act as at present or in the Regulations as was the practice prior to 26th March 2006.

B. REDUNDANCY

16. The original concept of termination because of redundancy being a special category of dismissal was first recognised by the Supreme Court of South Australia in *R V Industrial Commission of South Australia; ex parte Adelaide Milk Supply Co-Op Ltd, (1977) 16 SASR 6*, where Bray CJ held “*that a job becomes redundant when the employer no longer desires to have it performed by anyone*”. This definition was subsequently varied and extended to include situations where the employer wishes the *duties* associated with a job to continue to be done, but through organisational changes may allocate those duties to other jobs thus rendering a *person* rather than a job to be redundant.
17. In the building and construction industry employers and unions introduced what amounts to portable redundancy schemes which, on the payment of a weekly contribution by the employer, relieves the employer of the need to make additional lump sum payments to employees on termination. Associated with these schemes in a number of states is the option to provide, for an additional fee for

portability of sick leave accruals. However not all employers participate in these schemes. In fact participation by members of the MPMSAA in either scheme is generally confined to contractors working in the commercial/industrial construction sector of the industry.

18. Long Service leave in the building and plumbing industries is covered by state based statutory portable schemes in which all employers are required to participate. Employees accrue long service leave based on their service to the *industry*, rather than service to a particular *employer* so that accrual is not lost at the termination of employment.
19. The NES discussion paper notes at paragraph 269 that:

“Redundancy pay is designed to compensate employees for the loss of non-transferable employee entitlements such as sick leave and long service leave and the inconvenience and hardship imposed by being made redundant”.
20. These factors, to a very large extent, do not apply to the building and construction industry, including the plumbing industry. Whilst termination of employment at the completion of a project is still common and accepted by employees, long service leave entitlements are not lost on redundancy. A significant number of employees also enjoy portability of sick leave accruals, whilst Award entitlements generally include benefits such as a “lost time” loading
21. However, it is not submitted that these factors mean that the building and construction industry should be exempted from the redundancy standard for a business of 15 or more employees. Rather it is submitted that the whole termination, redundancy and employee entitlements regime has been developed based on the foundation of daily hire. The termination standard should allow the daily hire regime to continue as to do otherwise would undermine one of the key pillars of employment in the building and plumbing industries.
22. MPMSAA therefore submits that the NES for termination of employment should reconfirm and maintain the exemption for daily hire employment in the building and plumbing industries. An appropriate amendment to the NES in either the Act or Regulations should include such daily hire employees in the proposed exemptions.

23. The wording of the exclusion does not need to be any more complicated than that which was included in Regulation 30BA of Workplace Relations Regulations which commenced on 31st December 1996 which provided (subclause numbering deleted):

“a daily hire employee who is performing work in the building and construction industry (including work in, or in connection with, the erection, repair, renovation, maintenance, ornamentation or demolition of buildings or structures)”

Although made in conjunction with the 1996 Act this regulation simply combined the wording of Regulations 30BC(1)(b)(i) and 30BC(4) of the 1994 Regulations.

MPMSAA would be pleased to provide further details on this submission. Point of contact regarding this submission is the National Workplace Relations Advisor, Mr Chris Harnath (03 9329 9622).